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FILED
NOV 14 1968

Supreme Court of the United States

October Term 1968

No. 968 #7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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November 12, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968
No. 580

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

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I

Appellees are incorrect in asserting (Br. p. 11) that former §§160 and 161 of the New York Penal Law, upheld in *Gitlow* v. *New York*, 268 U.S. 625, *affirming* 234 N.Y. 132, "are [not] now unconstitutional". The vague language of these statutes, even on their face, cannot meet current constitutional standards. *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Dombrowski* v. *Pfister*, 380 U.S. 479; *Baggett* v. *Bullitt*, 377 U.S. 360. As authoritatively interpreted by *Gitlow*, the statutes are admittedly

unconstitutional; as later interpreted by *People* v. *Epton*, 19 N.Y. 2d 496, *cert. denied and appeal dismissed* 390 U.S. 29, they are still vague.

It is no answer to argue (Appellees' Br. p. 15) that *Keyishian* is not in point because it involved the civil sanction of disqualification from civil service status and because the reference in the civil service statutes to the Penal Law definition was "uncertain". True, in *Keyishian* it was not clear whether the civil service statute intended to incorporate §160 of the Penal Law alone or both §§160 and 161. But this Court held *both* sections of the New York Penal Law unconstitutionally vague and if such vagueness was sufficient to invalidate a statute involving a civil sanction, *a fortiori*, it is sufficient to invalidate a criminal prosecution.

We do not follow appellees' argument (Br. p. 15) that *Keyishian* "has no effect . . . on the instant prosecution" because the appellants were prosecuted "under the safeguards and standards of the criminal law". One of the most vital safeguards and standards of the criminal law is that a statute must be clear as to its scope and intent before an indictment can be made under it—and that safeguard is conspicuously absent here.

II

Appellees agree (Br. p. 16) that *Keyishian* held that the broad language of the New York Penal Law, §§160 and 161 "had the effect of stifling the ability of teachers and others to speak freely". It follows that these statutes come squarely within the rule of *Dombrowski*.

Appellees seek to avoid this result by arguing (Br. p. 14) that here the problem of the chilling effect of such a statute was "within the reach of an acceptable limiting construction readily to be anticipated as a result of a single criminal prose-

cution." *Dombrowski* v. *Pfister*, *supra*, at p. 491. Clearly this is not so. The first criminal prosecution resulted in the *Gitlow* construction of the statute: it did nothing to correct the vagueness of the language of the law, but merely held that speech unrelated to action or to a "clear and present danger" was sufficient for a conviction. The second criminal prosecution, in *Epton*, resulted in a second construction of the statute. There the New York Court of Appeals reversed *Gitlow* and held that a clear and present danger must be present to maintain a conviction. But the language of the statute remains unchanged. It is as vague as it was at the time of *Keyishian* and can no more be corrected by a narrow indictment or a narrow construction than could the same statute be corrected by an enlightened administration of the civil service law.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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